Filed 11/16/10 P. v. Walters CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. MATTHEW DALLAS WALTERS, Defendant and Appellant.	E048881 (Super.Ct.No. SWF023341) **OPINION**

APPEAL from the Superior Court of Riverside County. Carol D. Codrington, Kelly L. Hansen, and Mark A. Mandio, Judges.* Affirmed in part and reversed in part with directions.

R. Randall Riccardo, under appointment by the Court of Appeal, for Defendant and Appellant.

* Judge Codrington denied defendant's first motion to suppress, Judge Hansen denied the second motion to suppress, and Judge Mandio accepted defendant's plea.

Rod Pacheco, District Attorney, and Ivy B. Fitzpatrick, Deputy District Attorney, for Plaintiff and Appellant.

Defendant and appellant Matthew Dallas Walters pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364). Defendant also admitted he had suffered one prior serious and violent felony conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)). He agreed to plead guilty on the trial court's indication that it would sentence him to four years in state prison. Defendant was subsequently sentenced to four years in state prison with credit for time served. Both parties appeal.

Defendant's sole contention on appeal is that the trial court erred in denying his motions to suppress evidence. We reject this contention and affirm the denial of the suppression motions.

On appeal, the People contend that (1) the guilty plea and sentence were the product of unlawful plea bargaining by the trial court; (2) the trial court abused its discretion when it dismissed defendant's prior prison term enhancements; and (3) the trial court erred when it failed to place its reasons for dismissing the prior prison terms in the

minutes. We agree with the People that the trial court engaged in unlawful plea bargaining and reverse.[1]

I

FACTUAL BACKGROUND[2]

On September 27, 2007, about midnight, Riverside County Sheriff's Deputy Joseph Sinz was on patrol in his marked police vehicle in an unincorporated area of Riverside County known as Meadowbrook on Highway 74 when he noticed a Ford Explorer driving with its right front headlight out. He also observed the vehicle make a right turn without using a turn signal. Based on these observations, Deputy Sinz initiated a traffic stop.

Upon making contact with the driver, identified as defendant, and a male passenger, identified as codefendant Elijah Jordon Ross,[3] the deputy noticed that they were "[e]xtremely nervous" and "fidgety." They were sweating and could not make eye contact with the deputy. They also appeared "fidgety while handing [the deputy] their identification cards." The deputy also observed that their hands were shaking

---

[1] Because we reverse the judgment based on the illegal plea bargaining, we need not address the People's remaining contentions.

[2] The factual background is taken from the January 26, 2009, hearing on the motion to suppress.

[3] Codefendant Ross is not a party to this appeal. Prior to the suppression hearing, codefendant Ross pled guilty to transportation of a controlled substance in violation of Health and Safety Code section 11379, subdivision (a), and was placed on Proposition 36 probation.

"[n]oticeably." Deputy Sinz further noted that the size difference between him and defendant and Ross was "substantial."

Deputy Sinz inquired if there was anything illegal in the vehicle, and defendant responded, "No." Deputy Sinz then asked defendant if it would be okay if he "checked" inside his vehicle. Defendant responded, "Sure." Deputy Sinz believed defendant's response indicated it was okay for him to search the vehicle.

Deputy Sinz thereafter asked Ross to exit the vehicle and asked defendant to keep his hands on the steering wheel. Defendant initially complied; however, as the deputy was walking Ross back to the patrol vehicle, he noticed that defendant had removed his hands from the steering wheel and was leaning over onto the passenger seat. Defendant was behind the seat, nearly out of view of the deputy. Deputy Sinz instructed defendant to place his hands back on the steering wheel, but defendant refused. Based on defendant's refusal, and for officer safety reasons, Deputy Sinz requested backup. Deputy Sinz explained: "Well, I asked [defendant] to keep his hands on the steering wheel, he initially complied, and then when I was out of view, he leaned over. Then I'm telling him again and he's still refusing. My safety concerns grow. I'm thinking maybe he might be arming himself or discarding something. I wasn't sure."

Once Deputy Sinz's partner arrived, Deputy Sinz approached the vehicle and asked defendant to place his hands outside the driver's window. Defendant complied. After Deputy Sinz saw defendant's hands, the deputy approached the driver's side of the vehicle and "repeatedly" asked defendant to exit the vehicle. In response, defendant

remained silent and, instead of exiting the vehicle, he rolled up both windows to the vehicle. The deputy could not see defendant's hands briefly and was "scared."

For safety reasons, Deputy Sinz eventually drew his firearm and at gunpoint asked defendant again to exit the vehicle and show his hands. Deputy Sinz observed that defendant's "fists were balled up." Defendant eventually opened the car door and stepped out. However, his fists were clenched. The deputy saw that defendant had the keys to the vehicle with the remote. Defendant locked the doors with the remote and hit the panic button. Deputy Sinz believed defendant may have been "creating a diversion or something to divide [the deputy's] attention."

Based on the observations of defendant's behavior, Deputy Sinz believed that there may have been a weapon or contraband in the vehicle. Deputy Sinz was "[e]xtremely concerned" about his safety throughout the entire encounter.

Eventually, defendant was taken into custody, handcuffed, and placed in a patrol vehicle. Deputy Sinz then searched the vehicle. Underneath the driver's seat, Deputy Sinz found a grey plastic stereo faceplate box. Inside the box was a methamphetamine pipe and a bag containing 1.0 gram of methamphetamine. In the rear cargo portion of the vehicle, Deputy Sinz found a small black compact disc case, which contained a bag of 27.5 grams of methamphetamine.

II

DENIAL OF SUPPRESSION MOTIONS

A. *Additional Factual and Procedural Background*

Defendant filed two suppression motions and had a hearing on each motion. The first hearing was held on January 26, 2009. Following the testimony of Deputy Sinz and argument from the parties, the court denied defendant's suppression motion, finding the deputy had "probable cause" to believe the vehicle contained contraband based on defendant's conduct.

The second hearing on defendant's suppression motion was held on June 4, 2009, in light of *Arizona v. Gant* (2009) ___ U.S. ___ [129 S.Ct. 1710, 173 L.Ed.2d 485] (*Gant*). After the trial court examined the undisputed facts with the attorneys, it indicated its belief that defendant withdrew his consent to search the car based on his actions in locking the car. Both parties agreed with that assessment. Following argument from counsel, the court denied defendant's suppression motion, finding *Gant* did not apply under these circumstances and that the search of defendant's vehicle was justified under *Michigan v. Long* (1983) 463 U.S. 1032 [103 S.Ct. 3469, 77 L.Ed.2d 1201] (*Long*) based on the deputy's reasonable fear for his safety. In addition, after finding the deputy's "search of the vehicle was reasonable based on the specific articulable facts that [were] presented to him," the court disagreed with the previous finding that "there was probable cause to search the vehicle for contraband" and specifically found there was no probable cause to search for contraband.

B. *Standard of Review*

In reviewing the denial of a motion to suppress evidence, we defer to the trial court's express or implied factual findings where supported by the evidence and exercise our independent judgment in determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) "The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution. . . . [I]t becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." (*People v. Lawler* (1973) 9 Cal.3d 156, 160, fn. omitted.)

C. *Issue on Appeal*

Defendant contends the trial court erred in denying his suppression motions because his "de facto arrest" was not supported by probable cause, and there was no evidence or reasonable suspicion to suggest defendant posed a threat to anyone. He further argues that his conduct of locking the car "effectively negated any prior consent to search the vehicle he may have given."

We believe the issue here is whether the deputy had probable cause, based on specific articulable facts, to search the vehicle, not whether the deputy had probable cause to arrest defendant or whether the search was incident to a lawful arrest. In fact, the People have never asserted that the search was conducted incident to a lawful arrest or that the deputy had probable cause to arrest defendant before searching the car.

Accordingly, defendant's reliance on *Gant, supra*, 129 S.Ct. 1710, is puzzling. In *Gant*, the United States Supreme Court recently held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Id.* at p. 1723.)

Here, Deputy Sinz did not search defendant's car incident to arrest. Moreover, the *Gant* court specifically noted that there still exist "[o]ther established exceptions to the warrant requirement [which] authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand." (*Gant, supra*, 129 S.Ct. at p. 1721.) In particular, "[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." (*Ibid.*) That is, "*Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader." (*Ibid.*)

Gant has no application here. As explained, *post*, based on his observations of defendant's actions, Deputy Sinz had probable cause to search the vehicle for contraband.

D. *Legal Principles*

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." However, "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are

unreasonable." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250 [111 S.Ct. 1801, 114 L.Ed.2d 297].)

The Fourth Amendment prohibits seizures of persons, including brief investigative detentions, when they are "'unreasonable.'" (*People v. Souza* (1994) 9 Cal.4th 224, 229.) In order to pass constitutional muster, a detention must be "based on 'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity." (*Id*. at p. 230.) Thus, as specific to a vehicle stop, "a police officer can legally stop a motorist *only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law." (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926.) Here, it is undisputed that Deputy Sinz lawfully stopped defendant for having a defective front headlight and for failing to use a turn signal.

Warrantless searches, although usually per se unreasonable, are considered reasonable in various contexts. (*Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].) The warrantless search of an automobile, for instance, can be justified on a variety of grounds, among them: (1) probable cause to believe the car contains contraband (*Carroll v. United States* (1925) 267 U.S. 132, 149 [45 S.Ct. 280, 69 L.Ed. 543]); (2) the search is incident to the arrest of an occupant of the vehicle (*New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768]); and (3) the search is part of the inventory of a lawfully impounded vehicle (*South Dakota v. Opperman* (1976) 428 U.S. 364, 375-376 [96 S.Ct. 3092, 49 L.Ed.2d 1000]).

Under the automobile exception to the Fourth Amendment's prohibition against warrantless searches, a vehicle, because of its mobility, may be searched without a warrant when police have probable cause to believe it contains contraband. (*Maryland v. Dyson* (1999) 527 U.S. 465, 466-467 [119 S.Ct. 2013, 144 L.Ed.2d 442].) If probable cause exists, there is no separate exigency requirement for the automobile exception to apply. (*Pennsylvania v. Labron* (1996) 518 U.S. 938, 940 [116 S.Ct. 2485, 135 L.Ed.2d 1031].) The People need not demonstrate that the vehicle was likely to be moved, and the reasonableness of the search is unaffected by whether the defendant was taken into custody. (See *People v. Superior Court* (*Overland*) (1988) 203 Cal.App.3d 1114, 1119-1120.)

E. *Analysis*

If Deputy Sinz had probable cause to believe defendant's car contained contraband, his warrantless search of that vehicle was authorized under the automobile exception. In determining probable cause, we must make a "practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].) We conclude there was a fair probability in this case.

Deputy Sinz properly stopped defendant for Vehicle Code violations. Upon making contact with defendant and the passenger, Deputy Sinz observed that defendant and his passenger were "[e]xtremely" nervous and fidgety. They were sweating and

could not make eye contact with the deputy. In addition, their hands were visibly shaking while handing the deputy their identification cards. Moreover, defendant engaged in furtive conduct and failed, at times, to comply with the deputy's directives. Deputy Sinz asked defendant to keep his hands on the steering wheel. Defendant initially complied; however, defendant then removed his hands from the steering wheel and was leaning over into the passenger seat. Deputy Sinz instructed defendant to place his hands back on the steering wheel, but defendant refused. Even after Deputy Sinz's partner arrived, defendant continued to engage in furtive and confrontational behavior. Deputy Sinz was in fear for his safety and believed defendant may have been discarding contraband or a weapon. Based on his observations of defendant's behavior, it was reasonable for Deputy Sinz to believe there would be a weapon or contraband in the vehicle.

Probable cause "'means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion.' . . . While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" (*Illinois v. Gates*, *supra*, 462 U.S. at p. 235.)

The search of defendant's vehicle was lawful under the automobile exception. Assuming, without deciding, that defendant properly brought his second suppression motion and the court had jurisdiction to hear it (see, e.g., *Madril v. Superior Court* (1975) 15 Cal.3d 73, 77-78; *People v. Brooks* (1980) 26 Cal.3d 471, 474-478; *People v. Sotelo*

(1996) 47 Cal.App.4th 264, 269-274, and the cases cited therein), we need not address whether the search was authorized as a protective search of the vehicle to uncover weapons pursuant to *Long*, *supra*, 463 U.S. 1032.[4]

III

UNLAWFUL PLEA BARGAINING

The People argue that the trial court engaged in unlawful plea bargaining. We agree. The trial court stepped into the role of the prosecutor when it induced defendant to plead guilty and admit the prior allegations in exchange for a commitment to dismiss the two prior prison terms.

A. *Additional Factual and Procedural Background*

On November 16, 2007, a felony complaint was filed, charging defendant and codefendant Ross with possession of methamphetamine for sale (Health & Saf. Code, § 11378) (count 1); transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) (count 2); and possession of drug paraphernalia (Health & Saf. Code, § 11364) (count 3). The complaint further alleged defendant had sustained a prior serious and

---

[4] In his reply brief, defendant claims the trial court (specifically Judge Hansen) "[c]learly" stated that "'there was no probable cause to search for contraband,'" and therefore "[a]ny attempt to justify the search of [defendant's] vehicle based on probable cause of his possessing contraband must fail . . . ." However, defendant fails to explain why Judge Codrington's initial ruling in finding the deputy had probable cause to search the vehicle for contraband is superseded by Judge Hansen's later ruling denying his suppression motion on a different ground. In fact, it appears that defendant attempted to take a bite of the apple twice by filing a second suppression motion in the guise of presenting a new ground, i.e., *Gant*, *supra*, 129 S.Ct. 1710, which clearly does not apply in this case.

violent felony conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)).

Prior to the preliminary hearing, Judge Michael S. Hider offered defendant an indicated sentence of six years in a substance abuse treatment program at the California Rehabilitation Center. Defendant rejected that offer and proceeded to a preliminary hearing. Following the preliminary hearing, defendant was held to answer on all counts, and an information was filed on November 21, 2008. An amended information, which corrected the dates of defendant's priors, was filed on February 5, 2009.

While defendant's case was pending before Judge Mark A. Mandio, defendant sought an indicated sentence on several occasions. On February 5, 2009, the court offered an indicated sentence of five years, which was rejected by defendant. On February 27, 2009, the court offered to grant defendant an opportunity to participate in the Recovery Opportunity Center (ROC) drug rehabilitation program if he qualified. The People objected, arguing it amounted to "unlawful judicial plea bargaining in a sense that it permits the defendant to forum shop. . . ." The court disagreed, explaining: "I am not extremely familiar with all the options in drug programs, and for the first time today this came up as a possible option, and I still don't know if [defendant] is eligible. Had that option been mentioned before, I might have considered it. So I still think this is within the reasonable range of outcomes for this case . . . ." The court thereafter referred defendant to the ROC program to be evaluated. Defendant eventually was found to be ineligible for the ROC program.

On June 24, 2009, defendant appeared before Judge James S. Hawkins. At that time, defense counsel inquired: "Is the Court willing to entertain an indicated, Your Honor?" The prosecutor explained that defendant's maximum exposure was 10 years and that the People had offered four years four months prior to the preliminary hearing. Judge Hawkins gave an indicated sentence of five years, which was again rejected by defendant.

When the parties reappeared before Judge Mandio on July 7, 2009, defense counsel asked whether the court was willing to give another indicated sentence. The following colloquy thereafter occurred:

"THE COURT: I can't. Remember, we're pinned to the number.

"[DEFENSE COUNSEL]: Not really pinned. The Court can just give low term doubled and not enforce one of the prison priors.

"THE COURT: I thought you said the minimum possible plea with a plea to the Court is five years.

"[DEFENSE COUNSEL]: No minimum is four years. Low term doubled on the transportation, and if the court chooses to stay one of the prison priors, it will be four years.

"THE COURT: I swear you said that repeatedly to me.

"[DEFENSE COUNSEL]: The Court gave indicated prior in chambers of five years."

After the prosecutor was contacted, the court informed the prosecutor that defendant "would like to plead guilty to the charges," and receive a total of four years. The court also noted that he was considering "his indicated."

The prosecutor objected, arguing: "[T]his is nothing more than judicial plea bargaining, because the Court had already given an indicated of five years." The prosecutor further explained: "[Defendant] has two prison priors. Not one, but two. And so for this Court to suddenly now change an indicated that was previously given of five years to four years would require the Court to strike two prison priors in the interest of justice with reason stated in the minutes. And the only possible reason at this point is to induce a plea. It is simply judicial plea bargaining at its finest. [¶] The defense has been given an indicated. They rejected that indicated. They stated they want to go forward with trial. This case has already been assigned a trial department after rejecting the Court's indicated. Now, we're back here during our trailing period, and the Court is considering giving in to the defendant's requested indicated sentence. [¶] I think the mere fact it is a defense-requested indicated states it is judicial plea bargaining. It is not the Court giving an indicated sentence based on what this Court believes is appropriate given the defendant's criminal history and the facts of this case. That indicated sentence [of] five years that this Court had previously given has been rejected."

The court disagreed with the prosecutor's characterization of the plea and noted, "[I]f the Court thinks that there's a reasonable range of punishments, even if the defense attorney comes back and says . . . the client doesn't want to take this indicated, but if the

Court is willing to indicate in a lower amount, that is . . . within reasonable range of punishments, then it's not judicial plea bargaining for the Court to indicate that amount."

Following a discussion of the current case and defendant's past history, the court offered defendant an indicated sentence of four years. It explained that it would sentence defendant to the midterm of two years on count 1, doubled due to the prior strike allegation, run the remaining counts concurrently, and strike the two prior prison term allegations. Defendant immediately accepted the court's offer and pled guilty to all of the charges and admitted all of the prior allegations, in exchange for the court's indicated sentence of four years. The court thereafter sentenced defendant to a two-year midterm on count 1, doubled pursuant to the prior strike allegation; ran the remaining counts concurrently; and struck both prior prison term allegations "so that [defendant's] total custody commitment is four years."[5]

---

[5] We note that while this appeal was pending before this court, defendant's appellate counsel remitted a letter to Judge Mandio dated May 25, 2010, in regard to the dismissal of the two prior prison terms. In pertinent part, the letter stated: "The record does not state the reasons, as required by Penal Code section 1385, why the court dismissed [defendant's] two prison priors. This letter is addressed to you because the error is apparently due to simple inadvertence." Defense counsel therefore requested that the court's "already stated reasons for the dismissal" of the two prior prison terms be set forth in the court's July 7, 2009, minute order. This court has no record of whether the trial court amended its July 7, 2009, minute order to reflect the court's reasoning for dismissing the two prior prison terms as required by Penal Code section 1385. In any event, because we do not address the People's issue of whether the trial court erred when it failed to place its reasons for dismissing the prior prison terms in the minutes, this information is immaterial.

B. *Legal Principles*

In *People v. Orin* (1975) 13 Cal.3d 937 (*Orin*), our Supreme Court stated, "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment . . . . [I]mplicit in all of this is a process of 'bargaining' between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them. [Citation.]" (*Id.* at pp. 942-943.)

Furthermore, the process of plea bargaining implicates the separation of powers doctrine. (*People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 275-276.) Accordingly, "the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection." (*Orin*, *supra*, 13 Cal.3d at p. 943.)

In addition to treading on prosecutorial discretion, judicial plea bargaining—that is, disposing of charges over the objections of the prosecutor in order to induce a guilty plea—may "contravene express statutory provisions requiring the prosecutor's consent to

the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. [Citation.]" (*Orin, supra*, 13 Cal.3d at p. 943, fns. omitted.)

Defendant responds that there was no improper plea bargain because no "bargaining" was involved; defendant pled guilty to all of the charges and admitted all of the prior enhancements. (See *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1567.) Thus, defendant argues that the prosecution's agreement was not required because there was only an indicated sentence. (*People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261, 1270-1271.)

The argument raises the distinction between improper plea bargaining by the court and the giving of an indicated sentence. It is not uncommon for trial courts to encourage resolution of criminal cases without the prosecutor's consent by employing what has come to be known as the "indicated sentence." "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No 'bargaining' is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]" (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) In such cases, the trial court "may indicate to [the] defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent

right to challenge the factual predicate and to argue that the court's intended sentence is wrong." (*People v. Superior Court (Felmann)*, *supra*, 59 Cal.App.3d at p. 276.) An "'indicated sentence' . . . falls within the 'boundaries of the court's inherent sentencing powers.'" (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296.)

On the other hand, plea bargaining generally refers to an agreement between the prosecution and defense that is approved by the court. (*Santobello v. New York* (1971) 404 U.S. 257, 260-262 [92 S.Ct. 495, 30 L.Ed.2d 427].) Penal Code section 1192.5 is the general plea bargaining statute. It provides that, upon a plea of guilty, the plea may specify the punishment. The defendant must be sentenced to the specified punishment if the plea is accepted by the prosecutor in open court and approved by the trial court. The section also provides: "If the plea is *not* accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available." (*Ibid.*, italics added.)

The difference between a plea bargain and an indicated sentence is that "[p]lea bargaining . . . may be related to an 'indicated sentence' but is a distinct way of compromising a case short of trial. When giving an 'indicated sentence,' the trial court simply informs a defendant 'what sentence he will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.' [Citations.] An accused retains the right to reject the proposed sentence and go to trial. The sentencing court may withdraw from the 'indicated sentence' if the factual predicate

thereof is disproved. [Citation.]" (*People v. Superior Court* (*Ramos*), *supra*, 235 Cal.App.3d at p. 1271.)

The trial court here gave what appeared to be an indicated sentence: it stated to defendant that if he pled guilty to all of the charges and admitted all of the prior enhancements, the court would sentence him to a total term of four years. But that sentence could be imposed only if the trial court dismissed the two prior prison term enhancements. Therefore, it was more than just an indicated sentence; it included, anticipatorily, the dismissal of the two prior prison term enhancements. (Cf. *People v. Superior Court* (*Ramos*), *supra*, 235 Cal.App.3d at p. 1269.) The court essentially made a promise in exchange for a guilty plea.

Even though Penal Code section 1385 gives the trial court discretion to dismiss "an action" in the interests of justice, the anticipatory commitment by the trial court to exercise that discretion to dismiss the prior prison term enhancements cannot be used to negate the role of the prosecutor. Such application encroaches on the prosecutor's charging authority and exposes the process to the evils discussed by our Supreme Court in *Orin*, *supra*, 13 Cal.3d at page 943 as set forth, *ante*.

Defendant maintains, however, that this was nothing more than a plea of guilty to all charges and admission of all the prior enhancements with an indicated sentence. To the contrary, defendant's characterization ignores the fact that the plea did not expose him to punishment for the two prior prison term enhancements because the trial court had promised to dismiss them. The form of the bargain was to have defendant admit the two

prior prison term enhancements in anticipation of the trial court "exercising" its discretion to dismiss them, but the substance of the bargain was no different from the trial court dismissing the two prior prison term enhancements before taking the plea. Therefore, the bargain could be made only with the prosecutor's consent; and it is clear here that the prosecutor vigorously objected to the agreement on the record.

By defendant's reasoning, the trial court could agree to dismiss any or all of the charges or enhancements, pursuant to Penal Code section 1385, in exchange for a defendant's guilty plea on all the charges and enhancements. Such a practice is within neither the spirit nor the letter of state law as summarized in *Orin*.

The record, as set out above, shows that the trial court manipulated the sentence in order to reach a predetermined result instead of exercising its sentencing discretion. The court did not reserve discretion to change its sentencing decision. (Cf. *People v. Delgado* (1993) 16 Cal.App.4th 551, 555 [appellate court found that the trial court gave an indicated sentence based on the fact that the court retained its discretion to change its sentencing choice after review of the probation report and statement from the victim].) This was a judicial decision to impose a four-year sentence, regardless of subsequent facts, argument, or probation department recommendations. The fundamental principles behind plea bargaining were violated.

We therefore conclude that the plea bargain in this case exceeded the trial court's authority and must be vacated.

IV

DISPOSITION

The orders denying the motions to suppress are affirmed. The judgment is reversed and the sentence is vacated. The trial court is directed to allow defendant to withdraw his guilty plea.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.